Supreme Court, U.S.
FILED
JUL 8 1999
OFFICE OF THE CLERK

(2)

No. 98-1974

IN THE

Supreme Court of the United States

ANN A. MERGENS, individually, and as Trustee for the Ann A. Mergens Revocable Trust, MARY MERGENS LOUGHRAN and PAUL MERGENS,

Petitioners,

v.

ALEX W. DREYFOOS, JR., PHOTO ELECTRONICS CORPORATION, a Florida corporation, CAROLYN B. DREYFOOS, D.E. "JOSH" MURRAY, and PHOTO ELECTRONICS COMPANY, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT M. MONTGOMERY, JR.
MONTGOMERY & LARMOYEUX
1016 Clearwater Place
West Palm Beach, FL 33402-3086
(561) 832-2880

JAMES W. BEASLEY, JR.
Counsel of Record
ROBERT J. HAUSER
BEASLEY, LEACOCK
& HAUSER, P.A.
Flagler Center, Suite 1400
505 South Flagler Drive
West Palm Beach, FL 33401
(561) 835-0900

Attorneys for Respondents

153805

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDING

Pursuant to Sup. Ct. R. 14.1(b), Respondents list below all parties to the proceeding in the Court of Appeals:

(1) The Ann A. Mergens Revocable Trust

(2) Dreyfoos, Alexander W., Jr.

(3) Dreyfoos, Carolyn B.

(4) Loughran, Mary Mergens

(5) Mergens, Ann A.

(6) Paul Mergens

(7) D.E. "Josh" Murray

(8) Photo Electronics Corporation

(9) Photo Electronics Corporation, L.P. (a limited partnership)

Respondent, Photo Electronics Corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
A. Procedural History	1
B. Statement of the Facts	1
C. The District Court's Decision	3
D. The Eleventh Circuit's Opinion	4
Reasons for Denying the Writ	5
I. There Is No Conflict Among The Circuits.	5
II. Petitioners' Federal Law Arguments Were Not Properly Raised Below.	11
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

AM International, Inc. v. International Forging Equipment Corp., 982 F.2d 989 (6th Cir. 1993) 8

Bellefonte Re Insurance Company v. Argonaut Insurance Company, 757 F.2d 523 (2nd Cir. 1985) 11

Burgess v. Premier Corporation, 727 F.2d 826 (9th Cir. 1983) 6

Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359 (1952) 8, 9

Finn v. Prudential-Bache Securities, Inc., 821 F.2d 581 (11th Cir. 1987) 4, 8, 10

Finz v. Schlesinger, 957 F.2d 78 (2nd Cir. 1992) ... 7, 10

Locafrance U.S. Corp. v. Intermodal Sys. Leasing, Inc., 558 F.2d 1113 (2nd Cir. 1977) 7

Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986) 9

Parker v. DeKalb Chrysler Plymouth, Inc. v. Rule Industries, Inc., 7 F.3d 986 (11th Cir. 1993) 10

Cited Authorities

Page

Petro-Ventures, Inc. v. Takessian, 967 F.2d 1337 (9th Cir. 1992) 6, 7

Pettinelli v. Danzig, 722 F.2d 706 (11th Cir. 1984) 4, 7, 10, 12

Royal Air Properties, Inc. v. Smith, 333 F.2d 568 (9th Cir. 1964) 6

Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989) 8

United States v. Kimball Foods, Inc., 440 U.S. 715 (1979) 9

United States v. Restrepo, 986 F.2d 1462 (2nd Cir. 1993) 12

Statute:

Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.* (1980) 8

Rule:

Sup. Ct. R. 14.1(b) i

STATEMENT OF THE CASE

A. Procedural History

On December 28, 1995, Petitioners sued Respondents in the Southern District of Florida. Respondents answered, denying all material allegations of the Complaint. Respondents moved for judgment on the pleadings, based on the general release attached to the Complaint. The District Court granted judgment on the pleadings as to Counts I, II, III and IV, which were claims for federal securities law violations and common law fraud. (Count V, for common law breach of fiduciary duty, was dismissed for lack of federal jurisdiction.) *See Mergens v. Dreyfoos*, 1997 WL 611576 (S.D. Fla. 1997); (Pet. App. B at 36a). Petitioners appealed. The Eleventh Circuit affirmed, denied rehearing, and denied Petitioners' suggestion for rehearing *en banc*. *See Mergens v. Dreyfoos*, 166 F.3d 1114 (11th Cir. 1999); (Pet. App. C at 37a-38a).

B. Statement of the Facts

The Petitioners provide an incomplete statement of the facts. The opinions of the District Court and the Eleventh Circuit more fairly set forth the facts, which Respondents briefly summarize below.

George Mergens, the long-time business partner of Respondent Alexander W. Dreyfoos, Jr., died in 1986. The primary business venture in which Dreyfoos and Mergens were involved was the ownership of Photo Electronics Corporation ("PEC"), whose principal asset was television station WPEC-TV, in West Palm Beach, Florida. The

Petitioners are George Mergens' heirs, who inherited his PEC stock.

According to Petitioners' Complaint, after George Mergens' death, Dreyfoos embarked on a new strategy to force the Mergens to transfer to him their interest in PEC. The Mergens claimed that for years they "hounded" Dreyfoos for information about PEC, and obtained access to such information only after threatening litigation. The Mergens concluded that Dreyfoos was guilty of "mismanagement and fraud." (Petition at 4).

The Mergens' lawyers sent Dreyfoos a threatening letter on January 3, 1994. A 43-page draft complaint containing extensive accusations of fraud and dishonesty was enclosed; the letter stated that the complaint would be filed if Dreyfoos did not purchase the Mergens' PEC stock at the price they demanded.

Dreyfoos agreed to a settlement in order to avoid the threatened lawsuit. The parties entered into a detailed agreement (the "Settlement Agreement") on January 17, 1994, "as a means of resolving their dispute . . ." (Petition at 4). Under the terms of the Settlement Agreement, Dreyfoos paid the Petitioners $14.5 million for their PEC shares ($3 million in cash, and $11.5 million in a note). In exchange, the Mergens gave a general release covering "any claims" that the Mergens "ever had, now have . . . shall or may have, from the beginning of the world to the date [of the Agreement]".

The general release specifically included the causes of action for fraud and breach of fiduciary duty contained in the draft complaint. In the Settlement Agreement, the

Mergens specifically represented that they were sophisticated, that they had access to all relevant information that they had requested, and that they had obtained the advice of legal counsel and an independent certified public accounting firm in connection with the transactions contemplated by the Agreement. The Agreement contained a merger clause, which provided that there were no representations other than as set forth in the Agreement. The Agreement specified that it was governed by Florida law. Dreyfoos subsequently paid the full price of $14.5 million to the Mergens.

In the fall of 1995, a year and a half after the stock sale, the Mergens learned that WPEC was being sold for a substantial sum. The Mergens demanded rescission of the Settlement Agreement. Dreyfoos declined, and this lawsuit followed in December 1995. In their Complaint, to which the Settlement Agreement was attached, the Mergens alleged that Dreyfoos had fraudulently induced them to sell their stock at a price below its true value.

C. The District Court's Decision

On July 18, 1997, the District Court ruled that as a matter of law, Dreyfoos was entitled to judgment on the pleadings as to the claims of federal securities law violations and common law fraud. The District Court held that the general release contained in the Settlement Agreement barred these claims, and that the release could not be invalidated on the grounds of alleged fraudulent inducement. The decision was based on the facts that the Mergens were sophisticated parties; they were represented by legal counsel and financial advisors; and they settled their claims of fraud and dishonesty after a long adversarial

relationship. *See* Pet. App. B at 32a-34a. The District Court relied primarily upon on the Eleventh Circuit's opinions in *Pettinelli v. Danzig*, 722 F.2d 706 (11th Cir. 1984) and *Finn v. Prudential-Bache Securities, Inc.*, 821 F.2d 581 (11th Cir. 1987).

The Settlement Agreement provides that it is governed by Florida law. In the District Court, the Mergens relied upon Florida common law for the proposition that a release procured by fraud may be, under certain circumstances, invalidated.[1] The Mergens did not contend that federal law governed the validity of their general release.

D. The Eleventh Circuit's Opinion

On February 3, 1999, the Eleventh Circuit affirmed the District Court's decision, holding (1) that the general release barred all claims; and (2) the general release could not be set aside on grounds of fraudulent inducement. The Eleventh Circuit relied on its controlling precedent in *Pettinelli* and *Finn*.

In a footnote to their Eleventh Circuit brief, the Petitioners had noted that "*Pettinelli* has been criticized for applying Florida law in determining the effectiveness of a release of federal securities claims." (Brief of Appellants at 20, n.7). However, in the next footnote, the Petitioners also relied upon state law to attack the release. (*Id.* at 22,

---

1. Petitioners assert that the District Court "effectively held" that a release is valid even if it was procured by fraud. (Petition at 6). This is incorrect. The District Court's opinion contains a detailed analysis of the claim of fraudulent inducement of the release. *See* Pet. App. A at 5a-10a.

n.8). Petitioners did not assert as a point on appeal that federal law should govern the issue of the validity of the general release.

In its opinion, the Eleventh Circuit noted that it was applying Florida law to the release, consistent with the provisions of the Settlement Agreement. *See* Pet. App. A at 10(a). The Mergens filed motions for rehearing and rehearing *en banc* that were denied, and this Petition for a Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS.

The court below held that where a releasor is sophisticated, is represented by counsel and financial advisors, and settles claims of fraud and dishonesty after a long-standing hostile and adversarial relationship, a claim of fraudulent inducement of a general release is precluded as a matter of law. In these circumstances, the releasor cannot claim justifiable or reasonable reliance upon the adversarial party that the releasor is simultaneously accusing of dishonesty.

No Circuit Court of Appeals has ever held to the contrary. The decision below is not in conflict with the decisions of any other circuit, nor is it "idiosyncratic and unwise." (Petition at 9).

The conflict claimed by Petitioners is at best an abstract one: that the court below should have applied federal law. A footnote in the Petition contends that federal law would result in a different outcome, but the only case offered, *Burgess v. Premier Corporation*, 727 F.2d 826 (9th Cir. 1983) is factually inapposite. *See* Petition at 10, n.6. In *Burgess*, there is *no* indication that the releasors were sophisticated, were acting with advice of counsel, or that they were settling fraud claims in the context of a hostile and adversarial relationship.[2]

Petitioners' conflict cases are equally unpersuasive.

The Ninth Circuit is not in conflict with the Eleventh Circuit. In *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337 (9th Cir. 1992), the parties released each other from all prospective causes of action in a comprehensive settlement. Six months later, one of the releasing parties filed suit against a released party alleging federal securities law violations. The Ninth Circuit upheld the release (rejecting the same arguments which the Petitioners make here), and relied on the Second Circuit (which in turn relied on New York law):

> The parties here . . . were not so concerned with protecting their rights as investors as they were with establishing a general peace. See C.G.C. Music., Ltd., 804 F.2d at 1463 ("[T]he Release firmly evidences the parties' intent to end their

---

2. *Burgess*' quotation from *Royal Air Properties, Inc. v. Smith*, 333 F.2d 568 (9th Cir. 1964), also cited in footnote 6 of the Petition, shows the weakness of Petitioners' contention. *Royal Air Properties* does not even concern releases.

various disputes . . . once and for all."). We agree with the Second Circuit that

> [w]hen, as here, a release is signed in a commercial context by parties in a roughly equivalent bargaining position and with ready access to counsel, the general rule is that, if 'the language of the release is clear, . . . the intent of the parties [is] indicated by the language employed.'
>
> *Locafrance* [*U.S. Corp. v. Intermodal Sys. Leasing, Inc.*, 558 F.2d 1113, 1115 (2nd Cir. 1977)] (quoting *In re Schaefer*, 18 N.Y.2d 314, 317, 274 N.Y.S.2d 869, 872, 221 N.E. 2d 538, 540 (1966)).

Petro-Ventures recognized that "other circuits have not applied the federal policy against the release of unknown or subsequently maturing causes of action *without considering the circumstances in which a right was released.*" *Id.* at 1342 (*emphasis added*). Such circumstances are the core of the Eleventh Circuit's *Pettinelli/Finn* line of cases that were the foundation of the decision below.

The Second Circuit is not in conflict with the Eleventh Circuit, as indicated by the quotation above from *Petro-Ventures*. In *Locafrance*, the Second Circuit held that a general release barred federal securities law claims, citing New York law. *Locafrance*, 558 F.2d at 1115.

Similarly, there is no conflict between the Sixth Circuit and the Eleventh Circuit. In *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1483 (6th Cir. 1989), the court held that the "federal law of release between fiduciary and beneficiaries" required reversal of a summary judgment based on a release. However, the Sixth Circuit expressly found *no* conflict with the position of the Eleventh Circuit as expressed in *Finn*. *Id.* at 1482. Unlike the plaintiffs in *Finn*, the plaintiffs in *Street* were *not* in an adversarial relationship with the releasee, and were *not* represented by counsel. As to the claim that the release was voidable because of duress, the Sixth Circuit noted that it relied on "federal principles," whereas *Finn* relied on state law as to this issue, but that the substantive result was the same.[3]

Moreover, this Court's decision in *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952) poses no conflict with the decision below. In *Dice*, this Court held that where a railroad fireman was induced to sign a release by a deliberately false statement that the document was only a receipt for back wages, a jury verdict for the fireman could not be set aside on the grounds that the release was immune from a claim of fraud. The factors motivating the holding in *Dice*, uniform standards for injured railroad employees under the Federal Employer's Liability Act, are not present in this case, which involves a release agreed to by a sophisticated party, with advice of counsel, settling claims

---

3. The Sixth Circuit has applied Ohio law to govern the interpretation of a release that was argued to release federal claims under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.* (1980); *see AM International, Inc. v. International Forging Equipment Corp.*, 982 F.2d 989 (6th Cir. 1993).

of fraud arising from a long adversarial and hostile relationship.

The Ninth Circuit has explained the relationship between federal law and state law in the context of a release of a federal claim (under CERCLA). *See Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986). Federal law governs the issue of releases of federal causes of action (citing *Dice*). *Id.* at 1457. But that is only the initial step. "The next step is to determine whether, although federal law governs, state law should be incorporated to provide the content of that federal law." *Id.* The fact that federal law governs does not mean that a uniform federal rule need be fashioned. "Frequently, state rules of decision will furnish an appropriate and convenient measure of the governing federal law." *Id.* at 1458. Numerous cases from this Court were relied upon by the Ninth Circuit, including *United States v. Kimball Foods, Inc.*, 440 U.S. 715 (1979), which held that "state law may be incorporated as the federal rule of decision," particularly in cases involving commercial relationships "predicated on state law." *Id.* at 728-29. Here, the Settlement Agreement containing a Florida choice of law provision is just such a commercial relationship predicated on state law. No federal interest was frustrated by applying the parties' own choice of law.

Thus in the case of a release executed in a commercial context, the Ninth Circuit held that state law provides an appropriate body of law to be incorporated into federal law: "Because New York law on releases does not in any way appear to be aberrant or hostile to federal interests, we apply New York law in interpreting the Settlement Agreement and the Release." *Mardan*, 804 F.2d at 1460.

That approach is consistent with the Eleventh Circuit's application of Florida law; particularly where, as here, the claim of federal law was not raised at all in the District Court, and only tangentially in the Court of Appeals.[4]

Finally, the Eleventh Circuit's decision was not "unwise." As other Circuit Courts of Appeal have recognized, any rule other than that applied below would create an endless circle of litigation precluding finality of settlements: "[Plaintiff] who at all times believed that defendants were misrepresenting his entitlement to benefits, should not be permitted to strike a better bargain at this late date by claiming that he signed the agreement in reliance on defendants' misrepresentations." *Finz v. Schlesinger*, 957 F.2d 78, 83 (2nd Cir. 1992) (upholding waiver of ERISA benefits). As the Second Circuit concluded in another case:

---

4. As Petitioners concede, the Eleventh Circuit understands that federal law governs releases of federal claims. *See, e.g., Parker v. DeKalb Chrysler Plymouth, Inc. v. Rule Industries, Inc.*, 7 F.3d 986, 993 (11th Cir. 1993). However, as discussed above, that is only the beginning, not the end, of the analysis of whether state law should be applied.

Moreover, in the two earlier cases in which the Eleventh Circuit applied state common law to determine whether releases covering federal securities law claims were fraudulently induced, no federal law issue was raised. In the first case, the appellants (plaintiffs below) specifically invoked Florida law, not federal law. *See Pettinelli*, 722 F.2d at 708. In the second case, there was likewise no contention by any of the parties that federal law should be applied to determine whether a release containing a Florida choice of law provision was fraudulently induced. *See Finn*, 821 F.2d at 586. Similarly, the federal law issue was not properly raised below or preserved in this case.

> [P]laintiffs' argument is, in essence, that where the parties have sought to settle a claim of fraud, they cannot be bound by a settlement agreement unless the alleged defrauder has made full disclosure to the other party prior to settlement. We know of no authority to that effect, and we find the contrary principle established by *Alleghany Corp. v. Kirby*, 333 F.2d 327 (2d Cir.1964), *aff'd on rehearing*, 340 F.2d 311 (1965) (en banc; per curiam), *cert. dismissed*, 384 U.S. 28, 86 S. Ct. 1250, 16 L. Ed. 2d 335 (1966).

Bellefonte Re Insurance Company v. Argonaut Insurance Company, 757 F.2d 523, 527 (2nd Cir. 1985) (alleged fraudulent procurement of reinsurance contracts which were part of litigation settlement).

II.

PETITIONERS' FEDERAL LAW ARGUMENTS WERE NOT PROPERLY RAISED BELOW.

The Petition should also be denied because the Petitioners' federal law arguments are procedurally barred.

In the District Court, the Mergens did not contend that the validity of their general release was governed by federal law rather than by state law. *See* Question Presented, Petition at 1. In fact, the Mergens urged the District Court to apply Florida law to invalidate the release. Plainly, the federal law issue was not preserved in the District Court and was therefore waived.

In the Eleventh Circuit, the federal law issue was not a point on appeal in the Petitioners' brief.[5] On the contrary, the Petitioners again urged the Eleventh Circuit to apply Florida law to invalidate their release. The sole references in the brief to the possible applicability of federal law were in footnotes. Such passing references cannot be the basis for a claim on direct appeal, much less the basis for a petition for certiorari:

> Reference to a claim in a footnote, without its having been identified in the manner required by rule 28 as one of the issues presented for review, as part of the argument, and as part of the relief sought, would be insufficient to present the claim for review on direct appeal.

United States v. Restrepo, 986 F.2d 1462, 1463 (2nd Cir. 1993).

The Eleventh Circuit's footnote, disposing of the issue raised in Petitioners' footnote, hardly constitutes a "holding"

---

5. All of the points on appeal sought to distinguish *Pettinnelli*:

   I. *Pettinnelli* Does Not Bar a Fraud Claim Based on a Misrepresentation Set Forth in the Parties' Written Agreement

   II. *Pettinnelli* Does Not Apply to Misrepresentations Made to Third Parties With Whom the Fraudfeasor is not an Adversarial Relationship

   III. *Pettinnelli* Does Not Apply to a Fraud Claim Based on Omissions

See Brief of Appellants at ii.

that warrants *certiorari* review. Most importantly, the question presented by the Petitioners is purely hypothetical. Under any body of law — Florida or federal — the result would not change.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES W. BEASLEY, JR.
Counsel of Record
ROBERT J. HAUSER
BEASLEY, LEACOCK
& HAUSER, P.A.
Flagler Center, Suite 1400
505 South Flagler Drive
West Palm Beach, FL 33401
(561) 835-0900

ROBERT M. MONTGOMERY, JR.
MONTGOMERY & LARMOYEUX
1016 Clearwater Place
West Palm Beach, FL 33402-3086
(561) 832-2880

Attorneys for Respondents